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IN THE
Supreme Court of the United States
OCTOBER TERM, 1960

No. 81.

TEXACO INC., *Petitioner*

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN
AND FOR NEW CASTLE COUNTY, AND THE HONORABLE
ANDREW D. CHRISTIE, sitting as a Judge of that
Court, *Respondents*

and

CITIES SERVICE GAS COMPANY, *Intervening Respondent*

On Writ of Certiorari to the Supreme Court of the
State of Delaware

BRIEF FOR PETITIONER TEXACO INC.

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OPINIONS BELOW

The opinion of the Superior Court of the State of Delaware in and for New Castle County (R. 8) is reported at 155 A.2d 879. The opinion of the Supreme Court of the State of Delaware (R. 33) is reported at 158 A.2d 478.

JURISDICTION

The judgment of the Supreme Court of the State of Delaware was entered on March 18, 1960 (R. 44). Petition for Writ of Certiorari was filed on May 6, 1960, and granted on June 13, 1960 (R. 781). The issue of Petitioner's rights and immunities under the Natural Gas Act was raised by its Answer (R. 59-68), by its Motion for Summary Judgment in the Superior Court (R. 170), and by its Petition for Writ of Prohibition in the Supreme Court of the State of Delaware (R. 1-7).

QUESTIONS PRESENTED

Where the Federal Power Commission has accepted, filed and made effective a rate for sales of natural gas over which it has regulatory jurisdiction and issued a certificate of public convenience and necessity authorizing sales at such rate, and neither the order of the Commission so establishing such rate nor the order issuing such an unconditioned certificate have ever been protested, challenged, modified or set aside pursuant to the exclusive procedure prescribed by the Natural Gas Act, does a state court, in a common law action of contract seeking partial refund of payments which were nevertheless made in conformance with the rate so established by the Commission, have jurisdiction or power

- (a) to determine that the effective filed rate is different from the rate accepted for filing by the Commission;
- (b) to determine that the formal action of the Commission in accepting such rate for filing and making it effective is a nullity;

- (c) to enforce, with retroactive effect, its own version of the effective rate when Section 22 of the Natural Gas Act, vests in federal district courts exclusive jurisdiction to enforce any liability or duty created by that Act.

STATUTES INVOLVED

The provisions of the federal statutes involved are Sections 4, 5, 7, 16, 19, and 22 of the Natural Gas Act, 52 Stat. 822, 823, 825, 830, 831, and 833, 15 U.S.C. §§ 717c, 717d, 717f, 717o, 717r, and 717u, which are set forth in the Appendix. The provisions of the Federal Power Commission's Regulations under the Natural Gas Act, which have the force and effect of statutes and are involved, are Sections 154.21, 154.91(a), 154.92 through 154.102, and 157.23 (a) and (b), 18 C.F.R. 154.21, 154.91(a), 154.92-154.102, 157.23(a) and 157.23-(b). These provisions are also set forth in the Appendix.

PRELIMINARY STATEMENT

The factual background of the instant proceeding parallels that underlying the companion proceeding No. 80, in which Pan American Petroleum Corporation, (Pan American) is the petitioner. The basic controversy in both cases concerns the rates for the sale of natural gas from the Hugoton Field in the State of Kansas to Cities Service Gas Company (Cities). Therefore, to avoid redundancy in briefing Texaco Inc. (Texaco)¹ adopts and supports the arguments advanced in the Pan American brief and urges the merits of those arguments upon this Court. Accordingly,

¹ Petitioner changed its corporate name from The Texas Company to Texaco Inc., effective May 1, 1959.

Texaco will limit its briefing to consideration of the specific circumstances of Commission action upon Texaco's rates and to emphasis of the jurisdictional question presented as specifically related to those Commission actions.

STATEMENT OF THE CASE

The sequence of events precipitating the present controversy is as follows:

The Period Prior to June 7, 1954²

1. By contract dated June 16, 1949 (R. 69-81) petitioner agreed to sell natural gas it produced from the Kansas Hugoton Field to Cities, the intervening respondent. Such sales admittedly were to be made in interstate commerce for resale (R. 208).³

2. By amendment dated September 8, 1949, additional acreage was added to the original commitment (R. 68).

3. On December 2, 1953, the State Corporation Commission of the State of Kansas entered its 11 cent

² Prior to the June 7, 1954 decision of this Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, the Commission made no attempt to exercise jurisdiction over the sales by producers in interstate commerce of natural gas for resale because it was of the opinion that the "production or gathering" exception of Section 1(b) of the Natural Gas Act exempted such sales. *Columbian Fuel Corp.*, 2 F.P.C. 200 (1940).

³ Although two smaller contracts between Texaco and Cities are also involved in this litigation (R. 53, 54), since the June 16, 1949 contract accounts for almost \$400,000 of the \$412,955.95 for which recovery is sought, in the interest of simplicity, Texaco's statement will be confined to the facts with respect to that particular contract. The June 16, 1949 contract subsequently became Texaco's FPC Rate Schedule No. 100.

Minimum Price Order, Docket No. 44,079-C (C-3216), (R. 262-268). After determining that "a fair and reasonable minimum price for gas at the wellhead in the Hugoton Field" of "eleven cents (11¢) per Mcf (14.65 pounds p.s.i.a.)" was "in the public interest and welfare" (R. 267), it made the payment of this minimum 11 cents per Mcf a condition precedent to the withdrawal of gas from the Kansas Hugoton Field on and after January 1, 1954 (R. 268).

4. By letter to Texaco dated January 21, 1954, Cities referred to the said Kansas Minimum Price Order, stated that Cities and others had petitioned for judicial review thereof and that "Pending final judicial determination of the said Order" it would pay for the gas at the rate of 11 cents. It added that:

"In the event the said order is finally judicially modified or declared to be invalid in whole or in part, as a result of which you have been overpaid for gas purchased during the interim aforesaid, Cities Service Gas Company will expect you to refund to it the amount of said overpayment." (R. 154).

Texaco did not reply to this letter nor has it ever agreed to such a refund.⁴

⁴ This January 21, 1954 "refund letter" is the document Cities and the Courts below considered as constituting the "contract" upon which Cities bases its suit. The letter was subsequently filed by Texaco with the FPC and became Supplement No. 4 to Texaco's FPC Rate Schedule No. 100 (R. 155-156). Each of Cities' voucher checks in payment for gas since January 1, 1954 contained a notation referring to this "contract" of January 21, 1954 (R. 56).

The FPC Filings and the Commission's Orders

5. Immediately after the June 7, 1954 holding of this Court that "all wholesales of natural gas in interstate commerce" are subject to regulation under the Natural Gas Act, *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682, the Commission promulgated producer Regulations, initially issued on July 16, 1954, and now codified with slight but immaterial modification at 18 C.F.R. §154.91, *et seq.*⁵ Every independent producer, as defined therein, who on, or since June 7, 1954 had engaged in the sale of natural gas subject to the Commission's jurisdiction, was required to file rate schedules and also to obtain certificates of public convenience and necessity authorizing such sales.⁶ The rate schedules to be filed were to be the basic contracts and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954. See Section 154.93 of the Commission's Regulations.

6. Responsive to these producer regulations, on September 24, 1954, Texaco, with a cover letter (R. 126), tendered to the FPC for filing the following:

- (a) copies of the June 16, 1949 gas sales contract with Cities (R. 69-81),
- (b) copies of the September 8, 1949 amendment adding additional acreage (R. 68), and

⁵ Since pertinent Sections of the Natural Gas Act and of the Commission's Regulations are set out in the Appendix, references thereto will be only by Section number.

⁶ Even though producers then engaged in jurisdictional sales had no certificates, they were prohibited from discontinuing such sales by Section 7(b) of the Act. *J. M. Huber Corp. v. Federal Power Commission*, 236 F.2d 550 (3d Cir. 1956), *cert. denied* 352 U.S. 971 (1957).

(c) seventeen separate billing statements, one for each production unit covered by the contract, showing that the rate being paid for this gas on June 7, 1954, was 11 cents per Mcf "in accordance with Kansas Corporation Commission Order Docket No. 44,079-C ('-3216)," which was the Kansas 11 cent Minimum Price Order (R. 130-138).⁷

Copies of such filings were also forwarded to Cities (R. 127, 212).

At the same time, Texaco also filed its Application for Certificate of Public Convenience and Necessity in the form specified by the Regulations, Section 157.23 (R. 173).

7. The June 16, 1949 contract filings were designated by the Commission as Texaco's FPC Rate Schedule No. 100 (R. 225). No protest of this rate filing of 11 cents was made by Cities pursuant to Section 154.27 of the Commission's Regulations nor under pertinent provisions of the Commission's Rules.

8. On December 29, 1954, the Commission duly convened and after considering Texaco's tendered 11

⁷ Because of the multiplicity of billing statements, exact copies of the Minimum Price Order were not included with the initial filing. However, when the FPC subsequently requested Texaco to do so (R. 149), Texaco submitted copies of the Minimum Price Order (R. 152) and copies of Cities' January 21, 1954 letter which Cities has referred to as the "refund letter" (R. 153). These two documents were then filed by the Commission and designated as Supplements Nos. 3 and 4, respectively, to Texaco's FPC Rate Schedule No. 100 (R. 155-156). Texaco had not included Cities' letter of January 21, 1954 in its initial rate filings because the Regulations only provided for the filing of "the basic contract and all supplements or agreements amendatory thereof", Section 154.93. Texaco has never agreed to the effectiveness of Cities' "refund letter" as a contract or an agreement.

cent rate, voted to accept the same for filing and directed that the filing companies be advised of this action. This formal action is reflected by the official minutes of this meeting (R. 222-225). They show that the Commission voted to accept "the rate filings identified on attached Table 1" (R. 224) which table, captioned "Summary of Independent Producer Rate Filings—Rates in Effect on June 7, 1954" shows for Texaco's Rate Schedule No. 100 the "Price, June 7, 1954 (¢ per MCF)" of 11 cents (R. 225).⁸

9. By letter order dated February 7, 1955, the FPC notified Texaco that its rate filings of September 24, 1954 in connection with its Rate Schedule No. 100 "have been accepted for filing" (R. 138-144).⁹

The letter also contained the usual Commission reservation that "the acceptance for filing" shall not

⁸ There is no question that the Commission intended to establish the 11 cent rate as Texaco's effective rate for these sales. In Order 174A issued July 16, 1954, 19 Fed. Reg. 4534 (1954), the Commission said, "a reasonable cut-off date [June 7, 1954] should be fixed in order to avoid confusion in attempting to readjust past transactions." The position of the majority that the effective rate was to be the price being charged and paid on June 7, 1954 was emphasized by Commissioner Digby in his dissent. He said: "In freezing the producers' rate as of June 7, 1954, they are deprived of any opportunity to file as an original rate schedule a sales contract in which the price of gas has increased since June 7, 1954."

⁹ Language used in this letter order further confirms the deliberate intent of the Commission to accept and establish the 11 cent rate being collected on June 7, 1954 as Texaco's effective filed rate. After calling attention to the possibility that the rate schedule might contain automatic price escalation clauses, the letter warned that when they were "invoked to change the rates being paid on June 7, 1954" the rate changing requirements of the Act and the Regulations must be followed (R. 139, emphasis supplied).

be construed as constituting "approval of any rate", which, of course, means only that acceptance is not to be construed as a finding that the rate is also "just and reasonable."¹⁰

10. Texaco forwarded to Cities a copy of the FPC February 7, 1955 acceptance letter.¹¹ Cities continued to pay Texaco at the 11 cent rate it had been paying since January 1, 1954. Shortly thereafter, Texaco received a letter from Cities dated May 13, 1955, stating that it could make payments for natural gas "only pursuant to filed Rate Schedules" and requesting copies of documents which had been filed with the FPC (R. 124). Texaco immediately replied by letter dated May 17, 1955, pointing out that most of the documents had already been furnished and forwarded a copy of Texaco's Application for Certificate of Public Convenience and Necessity. Cities was also reminded that it had been notified previously that Texaco's Application had been docketed as FPC Docket No. G-4824.

11. Less than a month later, by order dated June 7, 1955, the Commission gave due notice that a public hearing would be held on Texaco's certificate application on June 29, 1955 (R. 185). All interested parties

¹⁰ The Delaware courts apparently failed to appreciate the purpose of including this reservation in an "acceptance" letter order. The reasons why this standard "approval" reservation does not detract from the finality of the Commission's acceptance of the specific rate for filing are explained at length in the brief of Pan American in companion case No. 80 at pages 33-35 and footnote 18, page 34, to which reference is hereby made.

¹¹ Of course, the minutes of the Commission's formal action of December 29, 1954 accepting the 11 cent rate as the filed rate and the letter order of the Commission dated February 7, 1955 notifying Texaco of such acceptance are matters of public record, 18 C.F.R. §§ 1.36(c) (3) and (6).

were notified that "Protests or petitions to intervene may be filed * * * on or before June 27, 1955." Although others intervened (R. 185), Cities entered no protest nor did it intervene or appear at the hearing which was completed in November, 1955.

- 12. By order issued December 5, 1955, the Commission found that Texaco's sales of natural gas to Cities "are required by the public convenience and necessity" (R. 186) and issued a certificate of public convenience and necessity "authorizing the sales by Applicant" (R. 187). The certificate imposed no condition with respect to the filed rate of 11 cents. (R. 179-188).¹² By letter dated December 16, 1955, Texaco accepted the certificate and sent Cities a copy of the acceptance letter (R. 191). Cities remained silent, as it had with respect to Texaco's rate filing, pursued no course of action under Section 19 of the Act, and continued to pay at the 11 cent rate for the now permanently and unconditionally certificated sales.

13. On June 13, 1957, pursuant to Section 4(d) of the Act and the Commission's Regulations, Texaco forwarded to the FPC for filing a notice of change of rate from the then effective 11 cent rate to 11.055 cents (R. 144-147). This was designated Supplement No. 5 to

¹² This action obviously precludes any claim by Cities that the 11 cent rate was conditional on the Minimum Price Order being held to be valid. Conditional rates cannot be established by agreement of the parties, but only by order of the Commission under Section 7(e) of the Act which provides, in part: "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions *"as the public convenience and necessity may require."* (Emphasis supplied). Of course, such conditions must be specifically set forth. *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 270 F. 2d 404 (10th Cir. 1959).

Texaco's FPC Rate Schedule No. 100. By clause 13 in the June 16, 1949 contract, Cities had agreed to reimburse Texaco for $\frac{1}{2}$ of any increase in production taxes (R. 78) and the State of Kansas had imposed a severance tax equal to one per cent of the price of the gas at the wellhead. Such additional tax was to become effective July 1, 1957 (R. 146). Texaco's filing made it clear that the .055 cent increase represented $\frac{1}{2}$ of one per cent of Texaco's filed rate of 11 cents (R. 146). Pursuant to FPC Regulations, Cities was served with copy of this filing (R. 144). Again, Cities filed no comments or protest.

14. On August 21, 1957, the Commission duly convened and after consideration accepted Texaco's change in rate (R. 226-229). Table 2 attached to the official minutes of this FPC meeting and entitled "Summary of Independent Producer Rate Filings—Changes in Rate Filings Previously Reported to the Commission," shows that the rate for Texaco's FPC Rate Schedule No. 100 was changed from 11 cents per Mcf to 11.055 cents and that the "Effective Date" for the new rate was July 1, 1957 (R. 229).¹³

15. By letter order dated August 29, 1957, the FPC notified Texaco of the Commission's action accepting the change in rate from 11 cents to 11.055 cents and that same "shall be effective as of the dates shown."

¹³ If Cities had any lingering doubt that the Commission initially filed and established the rate of 11 cents it must have been dispelled by this action of the Commission. Unless the Commission had initially accepted the 11 cent rate as Texaco's effective filed rate, it could not have accepted the 0.55 cent increase which Texaco clearly showed represented $\frac{1}{2}$ of one per cent of the 11 cent initial rate which was still in effect July 1, 1957.

(R. 157-158). The effective date for Texaco's new 11.055 cent rate was shown to be July 1, 1957 (R. 158).

16. Cities did not protest, challenge or object to the Commission's formal action of accepting this change in rate for filing, but, effective as of July 1, 1957, commenced paying the 11.055 cent rate.

17. On January 20, 1958, this Court in *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 335 U.S. 391, reversed the decision of the Kansas Supreme Court which had upheld the Minimum Price Order.

18. On January 29, 1958, Cities made demand upon Texaco for refund of alleged "overpayments" being the difference between the amounts Cities had paid during the period from January 1, 1954 through December 22, 1957, and the amount it would have paid had the lower "contract" rate been in effect.

**Cities' Collateral Attack Upon the
Filed Rate and Texaco's Response**

19. On June 18, 1958, Cities filed its complaint against Texaco in the Superior Court of the State of Delaware in and for New Castle County. The common law action was based on Cities' claim that its January 21, 1954 letter to Texaco, styled by Cities in its complaint as the "refund letter", together with the voucher checks merely referring to said letter constituted an "agreement" to "refund" in the event the Kansas 11 cent Minimum Price Order was judicially declared to be invalid (R. 52-59). Cities also advanced theories of restitution and unjust enrichment (R. 58). Cities' complaint, as originally filed, did not make reference to the interstate nature of the sales in relation to which refunds were sought, and likewise made

no reference to the fact that the supposed "refund letter" was filed with the Commission as Supplement No. 4 to Texaco's FPC Gas Rate Schedule No. 100. Nor did the original complaint make reference to any jurisdiction or action of the Commission with respect to these sales.¹⁴

20. Because of these omissions from Cities' original complaint, Texaco could neither successfully remove the action to the federal courts, nor could it effectively move to dismiss the complaint on grounds arising from the Natural Gas Act. (See page 48 of the brief of Pan American).

21. Texaco answered denying that the "refund letter", to which Texaco never agreed, constituted a contract to refund. It defended against Cities' complaint by setting out the provisions of the Natural Gas Act and the Regulations of the FPC requiring the filing of rates by independent producers, such as Texaco, and Texaco's compliance with such provisions (R. 59-68). Texaco cited the Commission's formal action and order accepting the 11 cent rate; the Commission's orders issuing notice of hearing, and then after hearing, issuing unconditioned Certificates of Public Convenience and Necessity authorizing the sales in question; the Commission's order accepting the filing of the Kansas Order and the "refund letter" as supplements to Texaco's Rate Schedule; and the Commission order accepting the subsequent increase

¹⁴ As Cities states on page 8 of its brief in opposition to Texaco's Petition for Writ of Certiorari:

"At no place in Cities' complaints is any reference made to, or reliance placed upon, the Natural Gas Act or any orders, rules or regulations issued thereunder or any action taken pursuant thereto. . . ."

from 11 cents to 11.055 cents per Mcf. Texaco then showed that Cities had filed no protest nor raised any objection to any of these reviewable orders of the Commission, and that Cities did not apply for rehearing upon or petition for review for modification or the setting aside of any of these orders under the exclusive mode prescribed by Section 19 of the Act.

22. On January 30, 1959, after supplementing the record to establish these matters, Texaco filed its Motion for Summary Judgment in the Superior Court action, challenging the jurisdiction of the state court (R. 170-171). Cities, in its brief filed in opposition to this motion, conceded for the first time that "It can claim no rate as a legal right that is other than the filed rate, whether fixed or accepted by the Commission, and not even a court can authorize commerce in a commodity on other terms." (R. 775). By such concession, Cities acknowledged that the success of its action depended upon the state court's finding that the filed rate was different from the 11 cent rate accepted for filing and filed, by the Commission. Thus, Cities' recovery necessitated a collateral attack upon rate and certificate orders of the Federal Power Commission.

The Decisions of the Delaware Courts

The Pan American brief at pages 11 through 14 accurately details the holdings of both Delaware courts below as those decisions affect the common interests of each petitioner here. Texaco believes that the few factual differences existing between its relations with Cities and the Commission as compared with Pan American's relations with the same parties are not significant to a decision of these matters on

the theories jointly advanced by petitioners in the courts below or to a decision on the arguments advanced here:

However, Texaco does contend that, had the Delaware courts taken cognizance of the additional fact that the Commission also had issued a certificate of public convenience and necessity to Texaco, under Section 7 of the Act, authorizing its sales to Cities unconditioned as to the Commission-filed rate of 11 cents already effective under Section 4 of the Act, those courts then would have appreciated the significance and correctly interpreted the conclusiveness and binding effect on them of the unprotested and now final Commission actions accepting and filing rates under Section 4 and of Commission orders authorizing commerce at those rates under Section 7.

The Delaware courts also failed to attribute any significance to the fact that the very "refund letter" upon which Cities "contract" action is based was filed by the Commission as a supplement to Texaco's Rate Schedule. Had they considered this fact, they would have realized that either an action based on that filed document or an action claiming restitution for payments in excess of an authorized filed rate are nothing more than attempts to enforce liabilities or duties arising under and created by the Natural Gas Act, and that such actions are, therefore, subject to the exclusive jurisdiction of federal district courts under Section 22 of the Act.

Furthermore, in purporting to establish their jurisdiction the Delaware courts admitted that, in order to determine whether they had jurisdiction to hear this action, they actually first had to make a determination of the very merits of the case (R. 12, 14). This cir-

cular reasoning resulted from the courts' admissions that no rate other than the filed rate could be charged, and therefore it was necessary for them to determine if the filed rate and the "contract" rate were identical. If so, the Delaware Superior Court could entertain the suit. But, if the courts' version of the filed rate differed from the contract rate, the courts reasoned that Cities' "common law" action would not lie because it would then be inconsistent with "federal law and regulation" (R. 14).

As to the period prior to June 7, 1954, the Delaware courts held that, "Since there were no filed rates with the FPC, there was no effective governmental price regulation in this field and as between the parties, the rates specified in their contracts would govern." (R. 18).

The Delaware Supreme Court entered final judgment on March 18, 1960, but stayed the same pending final order of this Court in any certiorari proceedings (R. 47-48).

SUMMARY OF ARGUMENT

At pages 19 through 38 of its brief, Pan American demonstrates that the Natural Gas Act provides a complete and exclusive scheme of rate regulation through the actions and orders of the Federal Power Commission. At pages 38 through 47 Pan American establishes that the finality attributed to rate orders of the Commission is such that only by following the specific and exclusive review procedures prescribed by Section 19, can those orders be modified or set aside. Texaco adopts each of these arguments, and, therefore, limits Section I of this brief to a showing of reasons why the "nullity" theory espoused by the Delaware

courts is erroneous when considered in conjunction with the Commission's actions and orders filing Cities' "refund letter" as a part of Texaco's Rate Schedule and issuing to Texaco an unconditioned permanent certificate of public convenience and necessity authorizing its sales to Cities:

Texaco further adopts the arguments of Pan American at pages 47 through 57—that the state courts are precluded from enforcing Cities' alleged claim because Section 22 lodges exclusive jurisdiction in federal district courts. In addition, in Section II hereof it is shown that the congressional intent, demonstrated by the selective passage of regulatory legislation in the years immediately preceding enactment of the Natural Gas Act, fully supports petitioners' position, and that Congress intended Section 22 to vest exclusive jurisdiction in the district courts of all suits or actions relating to rates for the sales of natural gas over which the Commission has been given jurisdiction, whether such claims be for "overpayments" or otherwise.

ARGUMENT

I. ORDERS AND ACTIONS OF THE FEDERAL POWER COMMISSION MUST BE REVIEWED PURSUANT TO EXPRESS STATUTORY PROVISIONS AND CANNOT BE COLLATERALLY SET ASIDE AS VOID

Only infrequently do courts pause, carefully consider and then delineate the fine but meaningful distinction involved where an act that is allegedly "void" is in fact and law an act that was merely once "voidable." Because the vastly different effect which flows from one condition as opposed to the other is not always important to, or dispositive of, matters before them, courts will often loosely interchange terms such as "void" and "voidable." However, the difference

between an allegedly "void" act or order and one which was merely once possibly "voidable" is real and is significant. See 92 C.J.S. *Void and Voidable*, §§1, *et seq.* (1955).

By failing to honor this distinction the Delaware courts in their decisions below have swept aside the comprehensive uniform regulation established by Congress through the Natural Gas Act.

As detailed in Texaco's discussion of its factual situation, Cities had notice at least four separate times (R. 138, 155, 157, 179) of actions and orders of the Commission establishing the rate of 11 cents being paid on June 7, 1954 as the effective filed and certificated rate for Texaco's sales to Cities. Each of these rate actions and orders as well as the order issuing a certificate to Texaco was reviewable under the procedures established by Section 19 of the Act. *Atlantic Refining Company v. New York Public Service Commission*, 360 U.S. 378 (1959) (Catco); *United Gas Pipe Line Company v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958); *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 332 (1956); *Cities Service Gas Co. v. Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1955) *cert. denied* 358 U.S. 837 (1958) (The *Magnolia* Case).

The Delaware Supreme Court solved the problem created by Cities' act of sleeping on its rights and failing to seek review of these Commission orders authorizing commerce by Texaco at the 11 cent rate by declaring these acts and orders of the Commission to be null and void. Despite Cities' successful pursuit of such statutory review under identical circumstances in the *Magnolia* case, the Delaware court

overlooked Cities' failure to follow the statutory remedy in these matters. It is then the opinion of the Delaware Supreme Court that when the Federal Power Commission issues an order which an affected party considers erroneous it is sufficient for that party to ignore the order, to disregard the exclusive review requirements of the Act, and, at such later date as it may choose, to seek relief from the burden of that order in a state court. The Delaware Supreme Court's theory is that if, after review of the Commission's action and the applicable law, it agrees with the party that the order was possibly erroneous or once "voidable," it too will ignore the order and grant the relief requested.

Such a theory of concurrent and collateral review enervates Section 19 of the Act and is diametrically opposed to this Court's delineation of the specific, complete and exclusive mode of review provided by such a statute. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). The complete confusion and pandemonium deriving from a system of individual speculation on the correctness of regulatory agency orders, augmented by state court second guessing, is clearly contrary to the uniform regulatory process Congress sought to create under the Natural Gas Act.

If the theory advanced by Cities and the theory adopted by the Delaware Supreme Court that the allegedly erroneous orders of the Federal Power Commission may be treated as "null" and "void" collaterally, is correct, then a long line of appellate court cases has been set aside and Section 19 of the Act has been rendered purposeless. See *City Service Gas Co. v. Federal Power Commission*, *supra*; *Natural Gas Pipe Line Company of America v. Federal Power Commission*,

253 F. 2d 3 (3rd Cir. 1958); *Phillips Petroleum Company v. Federal Power Commission*, 258 F. 2d 906 (10th Cir. 1958); *Kerr-McGee Oil Industries, Inc. v. Federal Power Commission*, 260 F. 2d 602 (10th Cir. 1958). Under the specific provision of Section 19(b) of the Act, and the decisions construing it, only those persons who are aggrieved by a Commission order can appeal from that order, and only final definitive orders fixing rights or determining liabilities are appealable. Therefore, under the "nullity" theory of the Delaware courts that the orders establishing the rates or the rates themselves were void in the above cases, those orders neither fixed rights, determined liabilities nor caused the parties to be aggrieved so that the federal courts would have lacked jurisdiction under the Act to review any of those orders. Thus, the "nullity" theory of the Delaware courts eliminates the need for and purpose of Section 19.

A. The Theory of the Courts Below Is Contrary to This Court's Catco Decision

Section 7(c) of the Natural Gas Act provides that no one may initiate sales in interstate commerce for resale until that party has been issued a certificate of public convenience and necessity by the Commission. For those sales which were being made in 1954 when the Commission instituted active jurisdiction over independent producers under the Natural Gas Act, it was ordered that applications for certificates be submitted and that certificates be obtained. Texaco, pursuant to these orders, submitted its application and was issued a certificate, unconditioned as to price, for its sales to Cities (R. 173-190).

In the *Catco* case, (*Atlantic Refining Company v. New York Public Service Commission*, *supra*) this

Court said at page 391 that Section 7 of the Natural Gas Act "requires the Commission to evaluate all factors bearing on the public interest" including "price proposals of producers." This determination requires the exercise of the special expertise of the Federal Power Commission before it authorizes the commencement of, or in the case of grandfather certificates, the continuation of interstate commerce at these rates.

Therefore, in addition to setting aside two acts of the Commission accepting and making effective rates tendered under Section 4, the Delaware Supreme Court's nullification of the action of the Commission certificating, permanently and unconditionally, Texaco's sales to Cities at the 11 cent rate, constituted a substitution by that state court of its "expertise" of what "is or will be required by the present or future public convenience and necessity" for that of the Commission. This results in the abrogation of regulatory powers which are essential to the proper administration of the Natural Gas Act and in effect deprives the regulatory body established by Congress of the exclusive exercise of its expertise which is the principal reason for its existence, whether its acts are pursuant to Section 4 or to Section 7.

B. The Theory of the Courts Below Is Contrary to This Court's Mobile Decision

The "refund letter" upon which Cities' suit is based in the Delaware courts has been filed by the Federal Power Commission as Supplement No. 4 to Texaco's Rate Schedule No. 100. In this letter, dated January 21, 1954, Cities stated that it would "pay for all gas purchased by it in the Kansas Hugoton Field" at a "minimum price of not less than eleven cents" (R. 153-

154): A copy of this letter was submitted by Texaco in response to the request of the Commission (R. 149-150), and after due consideration the Commission filed it as a supplement to Texaco's Rate Schedule (R. 155-156).

In the January 21, 1954 letter, Cities acknowledged that it was paying a rate of 11 cents and would continue to do so, but it also sought to provide for an automatic change in that rate upon the occurrence of certain contingent events. At the time the Commission filed this letter it specifically provided in its order, a copy of which Cities received, that any provisions for automatic changes in rate contained in the document filed would, when "invoked to change the rates being charged June 7, 1954," require compliance with the notice provisions of Section 4(d) of the Natural Gas Act (R. 155).

These facts result in the following logical sequence:

- (1) Cities was paying a rate of 11 cents at the time it wrote the letter (R. 154); Cities was also paying 11 cents on June 7, 1954 (R. 229).
- (2) Cities sought to provide in the January 21, 1954 "refund letter" for a further automatic change in the 11 cent rate upon the happening of certain contingent events (R. 154).
- (3) The Commission upon filing this letter specifically provided that if any change were to be made in the 11 cent rate being paid on June 7, 1954 such change in rate could not be effected without an additional filing under Section 4(d) giving at least 30 days prior notice to the Commission (R. 155).

- (4) No change or notice of change of the rate of 11 cents being paid on June 7, 1954 has ever been filed with the Commission to reduce that rate for the period involved herein. The only change was from 11 cents to 11.055 cents filed by Texaco (R. 145-147) and accepted and made effective by the Commission (R. 157-158).
- (5) Cities therefore is either bound by the theory it advanced in the courts below—a theory adopted by the Delaware Supreme Court—that the order of the Commission accepting and filing the “refund letter” is one of those orders which, because it is erroneous, or is deemed erroneous, need not be challenged under Section 19. If the order is a “nullity” then the January 21, 1954 letter is not on file with the Commission and Texaco’s position is exactly the same as that of the petitioner in No. 80. (See page 14, par. (1), Brief of Pan American.)
- (6) If the action of the Commission is not a nullity, then it is clear that there has been no change from the 11 cent rate filed by the Commission to the lower rate claimed by Cities because no change in rate notice has ever been filed pursuant to Section 4(d). This Court has held that the notice requirement of Section 4(d) is essential,¹⁵ *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 332 (1956). In

¹⁵ Section 4(d) provides *inter alia*: “Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate . . . except after thirty days notice to the Commission and to the public. . . .” In the order filing the January 21, 1954 letter the Commission specifically reiterated, and did not waive, this notice requirement (R. 155).

analyzing the *Mobile* decision two years later in the decision of *United Gas Pipe Line Company v. Memphis Light, Gas & Water Division*, 358 U.S. 103, this Court said at page 112:

“*Mobile makes it plain that ‘Section 4(d) on its face indicates no more than that otherwise valid changes cannot be put into effect without giving the required notice to the Commission, 350 U.S. at 339-340.’*” (Emphasis added).

Under either theory Cities' efforts are blocked by this Court's clear delineation of the law in the *Mobile* case. If Cities claims that the Commission action in filing the January 21, 1954 letter is a nullity and that it is actually suing on the letter as a common law contract, the language quoted immediately above precludes such suit because agreements as to the price for sales of gas in interstate commerce, no matter how “otherwise valid,” are not effective until submitted to, accepted, and filed by the Commission. If Cities contends that the letter is validly filed, the *Mobile* decision and the Act, require prior notice before “otherwise valid” changes in rates for interstate sales can be effected. Otherwise, Texaco and the thousands of other natural gas producers could avoid the rate changing requirements of Section 4(d) of the Act by merely bringing common law contract actions in state courts for recovery of increases in rates provided by the automatic price escalation clauses in their gas sales contract.¹⁶

¹⁶ As preposterous as this regulatory gap may seem, it is exactly what the Delaware courts have sanctioned. The Delaware Supreme Court said:

“If under the Natural Gas Act a gas producer and a distributor may agree to fix the rate, and from time to time to

II. CONGRESS INTENDED TO PRECLUDE STATE COURTS FROM ENFORCING THE REPAYMENT OF AMOUNTS ALLEGEDLY PAID IN EXCESS OF A RATE FILED BY THE COMMISSION

Section 22 of the Natural Gas Act provides that the district courts of the United States "... shall have *exclusive* jurisdiction ... of all suits in equity and actions at law, brought to enforce any liability or duty created by" the Act, and the Regulation and orders promulgated under that Act. (Emphasis added).

Cities acknowledges, as do the courts below, that no rate may be paid for natural gas sold for resale in interstate commerce other than the rate filed with the Federal Power Commission (R. 38, 775). Therefore, Cities' suit is an action brought to force repayment of amounts which Cities contends it paid in excess of that filed rate. The acceptance of amounts in excess of the rate on file is expressly forbidden by Section 154.21 of the Regulations, is contrary to the whole purpose of the Act, and the duty to repay such amounts arises from the Act, despite seemingly parallel common law causes of action. *Remar v.*

change it, absent any proceeding before the Commission to regulate the rate, why may they not agree that the rate to be paid shall be the contract rate if the rate imposed by a State Commission shall be held invalid? This, in effect, was what the parties here agreed upon. (Emphasis added.)

"If so, it seems to us that the claims here are not founded upon any liability created by the Natural Gas Act, but upon a private contract deriving its force from state law." (R. 41)

From this false premise—that the Commission doesn't "regulate the rate" until it issues an order finding the rate to be "just and reasonable" under Sections 4(e) or 5(a)—the court reasoned that it had jurisdiction to enforce recovery of Cities' claim which is based upon its "refund letter" even though that letter had been filed by the Commission as part of Texaco's Rate Schedule and even though no notice of change in rate had been filed pursuant to Section 4(d) of the Act.

Clayton Securities Corp., 81 F. Supp. 1014 (D. Mass. 1949). See also *United Gas Pipe Line Co. v. Willmut Gas & Oil Co.* 231 Miss. 700, 97 So. 2d 530 (1957) cert. denied 357 U.S. 937 (1958).

The reports and debates on the bill which ultimately became the Natural Gas Act, H.R. 6586, 75th Cong. 1st Sess. (1937), contain no references which elaborate on Section 22 of the Act other than the remarks of sponsors that the Section provides for the "jurisdiction of offenses and enforcement of liabilities and duties." See H.R. Rep. No. 709, 75th Cong. 1st Sess. (1937); S. Rep. No. 1162, 75th Cong. 1st Sess. (1937); 81 Cong. Rec. 3922, 6721-6733, 6740, 8670, 8918, 9312-9317 (1937); 83 Cong. Rec. 8343-8347 (1938). The statute, of course, is explicit in lodging "exclusive jurisdiction" with the federal judiciary. Here again arises "a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366, 374 (1956).

Despite the clear, concise language of the Act the Delaware courts, after analyzing and interpreting the various formal actions and the orders of the Commission, assumed jurisdiction to enforce the liability they found to exist as a result of this interpretation. The state courts contend that the common law form of Cities' initial pleading creates a parallel and concurrent jurisdiction in them to enforce the duty to refund which they feel exists.¹⁷

¹⁷ The Superior Court said:

"The plaintiff may not recover if its right to recover depends on a rate schedule which is contrary to the Natural Gas Act or any rule, regulation or order thereunder. But that is not

Review of Congressional action and the intention revealed by that action in relation to a series of legislative measures enacted between 1933 and 1938 destroys the concurrent jurisdiction theory adopted by the Delaware courts. During this period, Congress enacted or expanded six major items of legislation which contained vastly similar jurisdictional provisions. But in each of these legislative endeavors Congress carefully and explicitly provided for "concurrent" jurisdiction where that was desired and "exclusive" jurisdiction where that was its intention.

In Section 22 of the Securities Act of 1933, 48 Stat. 74, 15 U.S.C. §§ 77a-84 (1934 Edition), Congress provided that the district courts of the United States shall have jurisdiction of offenses and violations under the Act, and jurisdiction "*concurrent with state and territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by*" the Act (15 U.S.C. § 77v, 1934 Edition, *emphasis added*). One year later when it re-examined this same sphere of business activity and enacted the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. §§ 78a-78jj, Congress drafted a jurisdictional provision exactly similar in pertinent parts to that later used in the Natural Gas Act. Section 27, 15 U.S.C. § 78aa, contains the "exclusive jurisdiction" language as a result of due consideration by Congress of the fact that such language precluded state court jurisdiction. 78 Cong. Rec. 8099, 8571 (1934). The significance which must be accorded such deliberate selectivity of legislative endeavor has

to say that the action is based on a liability or duty created by such Act. Plaintiff merely asserts a cause of action which may not be *inconsistent with federal law or regulation*." (R. 14, *emphasis added*). The Delaware Supreme Court agreed (R. 41).

been judicially recognized. *American Distilling v. Brown*, 295 N.Y. 36; 64 NE 2d 347 (1945).

Having recognized the distinctions and exclusions created by the two different forms of statutory language, Congress again demonstrated its intention to be selective in its creation and limitation of jurisdiction. House Bill H.R. 5423, 74th Cong., 1st Sess. introduced in 1935 was originally drafted with three titles. As subsequently enacted on August 26, 1935 a portion of the original bill became Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U.S.C. § 79y providing that district court jurisdiction under the Act would be "concurrent with state and territorial courts".

Other portions of H.R. 5423 were enacted that same day into the Federal Power Act, 49 Stat. 863 (1935), 16 U.S.C. §§ 791a-825r. Section 317 of the Federal Power Act, 16 U.S.C. § 825p, despite the fact that it emanated from the same basic bill, and was enacted the same day, did not use the "concurrent" language of the Public Utility Holding Act but instead provided for, "exclusive jurisdiction" in the district courts.

In 1938, when Congress broadened the authority of the Federal Power Commission by extending its jurisdiction to cover natural gas, it chose to include in Section 22 of the Natural Gas Act the "exclusive jurisdiction" language rather than the "concurrent" language. Thus, Section 22 of the Natural Gas Act was intended to exclude state court jurisdiction.

The deliberate and selective method by which the Congress delineated the scope of federal jurisdiction in these various major legislative efforts enacted dur-

ing the same period underlines the intention of the Congress to provide exclusive federal control of the matters before this Court. The decisions of the Delaware courts not only do violence to the plain language of the Natural Gas Act; they open the way to multiple interpretations of actions and orders of the Federal Power Commission and disrupt the Commission's regulatory powers.

The Delaware courts, when earlier faced with a proceeding calling into issue the language of Section 27 of the Securities Exchange Act of 1934, which is exactly the same in pertinent language to Section 22 of the Natural Gas Act, said:

"This issue lies solely within the exclusive jurisdiction of other tribunals under Section 27 of the Act, and this court will not usurp that jurisdiction or any portion thereof. It is understandable why the legislative intent as to jurisdiction was so clearly expressed under Section 27, for, if uniformity of enforcement in the true sense is the object of the purpose to be attained, centralization of judicial decision and discretion should be as designated . . ." (*Standard Power and Light Corp. v. Investment Associates, Inc.* 29 Del. Ch. 593, 51 A. 2d 572 (1947)).

The decisions below, if sustained, will preclude uniform enforcement and centralized decision of matters arising under the Natural Gas Act, and will open to collateral attack, in the courts of the fifty states, past and future orders of the Federal Power Commission, contrary to clear congressional intent.

CONCLUSION

It is under the authority and regulation of the Natural Gas Act that the subject interstate sales of natural gas for resale are made. Section 19 of that Act provides the exclusive mode for review of, or attack upon, orders of the Federal Power Commission establishing duties and fixing rights. Section 22 prescribes that exclusive jurisdiction to enforce the rights, duties and liabilities flowing from these actions and orders of the Commission shall be in the federal judiciary. This Court's decisions have repeatedly recognized and enforced the single, uniform, comprehensive regulatory scheme established by the Act. Statutory language and case law preclude the collateral attack and concurrent jurisdiction sought to be established by the decisions below.

For the reasons hereinabove set forth, it is respectfully submitted that the judgment of the Supreme Court of Delaware should be reversed and vacated, and that the Writ of Prohibition prayed for in that court should issue.

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APPENDIX

APPENDIX

A. The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides in pertinent part:

Rates and Charges; Schedules; Suspension of New Rates

Sec. 4 (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938), and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such

rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(c) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded

and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938) ; 15 U.S.C. § 717c].

*Fixing Rate and Charges; Determination of Cost of
Production or Transportation*

Sec. 5 (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order:

Provided however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. § 717d].

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Extension of Facilities; Abandonment of Service

Sec. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such

natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f(a)].

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)].

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pend-

ing the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)].

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(d)].

(e) Except in the cases governed by the provisos contained in Subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized

by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)].

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U.S.C. § 717f(f)].

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U.S.C. § 717f(g)].

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations, or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action

or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000. [61 Stat. 459 (1947); 15 U.S.C. § 717f(h)].

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*Administration Powers of Commission; Rules,
Regulations, and Orders*

Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o].

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Rehearing; Court Review of Orders

Sec. 19 (a) Any person, State, municipality, or state commission aggrieved by an order issued by the Commis-

sion in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court

shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.

No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Section 1254 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. § 717r].

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*Jurisdiction of Offenses; Enforcement
of Liabilities and Duties*

Sec. 22. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder. Any criminal proceeding shall be brought in the district wherein any chapter or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254 and 1291-1294 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter. [52 Stat. 833 (1938); 15 U.S.C. § 717u]

B. The Federal Power Commission Regulations under the Natural Gas Act, 18 C.F.R., provide in pertinent part:

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154.21 Effective tariff

The effective tariff of a natural-gas company shall be the tariff filed and posted pursuant to the requirements of this part, and permitted by the Commission to become effective. No natural-gas company shall directly or indirectly, demand, charge or collect any rate or charge for or in connection with the transportation or sale of natural

gas subject to the jurisdiction of the Commission, or impose any classifications, practices, rules or regulations, different from those prescribed in its effective tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by order of the Commission.

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154.91 Applicability

(a) *Definition.* An "independent producer" as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sell natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

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154.92 Filing of Rate Schedules by Independent Producer

(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting for the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined:

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as

defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this Section file a statement showing (1) the approximate annual volume involved, (2) the rate charged therefor, (3) the name of the purchaser, and (4) the geographical location (field, county, and State) at which delivery is made.

154.93 Rate Schedule Defined

For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

154.94 Changes in Rate Schedules

(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate

commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule; rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission in triplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective. [Paragraph (b) amended by Order 202, 23 F. R. 3715, May 29, 1958]

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954, and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature, and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved.

(f) If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of the parties to whom such material has been mailed.

(g) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of the foregoing paragraphs in this section, file a statement showing (1) the approximate annual volume involved; (2) the rate charged therefor; (3) the name of the purchaser; and (4) the geographical location (field, county and State) at which delivery is made.

154.95 *Oral agreements*

If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in triplicate, a statement of his understanding of the

agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in triplicate, their understanding of the agreement. [Section 154.95 amended by Order 202, 23 F. R. 3715, May 29, 1958]

154.96 Filing date

Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Section 154.92 through 154.99 of these Regulations.

154.97 Cancellation or termination

When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of parties to whom the notice has been mailed.

154.98 Waiver of notice requirements

Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 90 days before the effective date.

154.99 Number of copies; material to be submitted with changes in rate schedules

Three copies of any rate schedule or part thereof, and material required by Section 154.95 to be filed therewith, and Notices of Cancellation or Termination submitted for filing, must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C. Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable. [Section 154.99 amended by Order 195, 22 F. R. 1329, Mar. 5, 1957]

154.100 Rejection of rate schedule and material submitted for filing

The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.92 through 154.99.

154.101 Acceptance for filing not approval

Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

154.102 Applicability of Sections 154.92 through 154.101

Sections 154.92 through 154.101 hereof shall be applicable only to those persons specified in Section 154.91 hereof.

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157.23 Applications for Certificates of Public Convenience and Necessity by Independent Producer

(a) Every independent producer of natural gas as that term is defined in section 154.91 who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act, as amended, shall, on or before December 1, 1954, file with the Commission an application (original and 7 copies) in accordance with sections 157.24 through 157.27. The Commission reserves the right to request additional copies. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by December 1, 1954 an application (original and five copies) containing the information called for by Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas ~~in interstate commerce or sale of such natural gas resale~~ in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 7 copies) pursuant to sections 157.24 through 157.27. The Commission reserves the right to request additional copies. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by Ex-

hibit A. Where the economic feasibility of a new pipe line or important extension or expansion of an existing pipe line depends upon proof of an adequate gas supply, all related applications necessary to effectuate the service shall be filed within time to enable the Commission to consider all related matters concurrently.